

EXHIBIT 5



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

Stop 9612

February 12, 2019

Michael Capeci, Esq.
Robbins Gellar Rudman & Dowd LLP
58 South Service Road, Suite 200
Melville, NY 11747

Re: Appeal, Freedom of Information Act Request Nos. 19-00932-FOIA & 19-00933-FOIA, designated on appeal as Nos. 19-00193-APPS & 19-00194-APPS

Dear Mr. Capeci:

This responds to your Freedom of Information Act (FOIA) appeal of the FOIA Officer's denial of your February 7, 2019 FOIA requests for investigative records concerning Hertz Global Holdings, Inc. ("Hertz").¹ By letter dated February 1, 2019, the FOIA Office granted your request in part. The FOIA Officer released to you twelve pages of records, in part, responsive to Item 3 of your request. The FOIA Office asserted FOIA Exemptions 6 and 7(C) to redact names and other identifying information from the records released to you. The FOIA Officer also informed you that he was withholding additional records that may be responsive to your request pursuant to Exemption 7(A).

On April 19, 2018, you filed this appeal challenging the FOIA Officer's invocation of Exemption 7(A).² I have considered your appeal and it is denied.

I have determined that the FOIA Officer correctly asserted Exemption 7(A).³ There is a two-step test to determine whether information is protected under Exemption 7(A), whether: (1) a law enforcement proceeding is pending or prospective, and (2) release of information about it could reasonably be expected to cause some articulable harm.⁴ We have confirmed with staff

¹ Specifically, your request sought the following records: (1) all records pertaining to the SEC's investigation into Hertz's restatement of its financial results for fiscal years 2011 through 2013, as reported in Hertz's Form 10-K for fiscal year 2014, filed on July 16, 2015; (2) all records pertaining to any accounting or internal control deficiencies at Hertz during the time period of January 1, 2013 to the present; and (3) any subsequently released records that pertain to Hertz after May 18, 2017.

² As you do not question the withholding of personal information under Exemptions 6 and 7(C), they are affirmed.

³ Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information * * * could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

⁴ See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (holding that the government must show how records "would interfere with a pending enforcement proceeding"); *Juarez v. Dep't of Justice*, 518 F.3d 54, 58-59 (D.C. Cir. 2008) (explaining that government must show that its ongoing law enforcement proceeding could be

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that releasing the documents responsive to Items 1 and 2 of your request could reasonably be expected to cause harm to ongoing enforcement proceedings.⁵

Further, under Exemption 7(A), an agency may withhold records if they come within categories of records whose disclosure would generally interfere with enforcement proceedings.⁶ The documents you seek come within categories whose disclosure would generally interfere with enforcement proceedings.

You first argue that your “request necessarily contemplates documents that were compiled by Hertz * * * not by the SEC, meaning they cannot be classified as having been compiled for law enforcement purposes.” This argument has been rejected by the courts.⁷ Thus, to the extent that the SEC staff obtained documents from Hertz (or any other party) in connection with its investigation, such documents were “compiled” (within the meaning of Exemption 7(A)) by the SEC and not Hertz or any other party.

You next argue that the “SEC’s claim that its investigation into Hertz is ongoing cannot be reconciled with the plain language of the [Cease-and-Desist] Order, which establishes the SEC’s investigation has ended.” We have confirmed with Enforcement staff that the underlying investigation that led to the enforcement proceeding concerning Hertz is still active and ongoing, as indicated in the SEC’s administrative summary concerning its settlement with Hertz.⁸ We

harmed by premature release of evidence or information).

⁵ See *OKC Corp. v. Williams*, 489 F. Supp. 576 (N.D. Tex. 1980) (SEC is not required to disclose requested materials directly tied to a pending investigation); *Nat’l Pub. Radio v. Bell*, 431 F. Supp. 509, 514-15 (D.D.C. 1977) (Congress intended that Exemption 7(A) would apply where disclosure may impede any necessary investigation prior to court proceedings); *Robbins Tire*, 437 U.S. at 232 (Congress intended that Exemption 7(A) would apply “whenever the Government’s case in court * * * would be harmed by the premature release of evidence or information.”); *Accuracy in Media, Inc. v. U.S. Secret Service*, C.A. No. 97-2108, 1998 U.S. Dist. Lexis 5798 at 11 (D.D.C. April 16, 1998) (affirmation that there is an active and on-going investigation is enough).

⁶ *Robbins Tire*, 437 U.S. at 236; see also *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1038 (7th Cir. 1998) (“the Government may justify its withholdings by reference to generic categories of documents”).

⁷ See *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) (holding that information not initially obtained or generated for law enforcement purposes may still qualify for Exemption 7 if it is subsequently compiled for a valid law enforcement purpose at any time prior to “when the Government invokes the Exemption”); see also *Lion Raisins v. USDA*, 354 F.3d 1072, 1082 (9th Cir. 2004) (“Information need not have been originally compiled for law enforcement purposes in order to qualify for the ‘law enforcement’ exemption, so long as it was compiled for law enforcement at the time the FOIA request was made.”); *ACLU v. Dep’t of Defense*, 389 F. Supp. 2d 547, 570 (S.D.N.Y. 2005) (photographs taken for “personal” use were compiled for law enforcement purposes, because Army Criminal Investigation Command opened an investigation immediately upon receipt of photographs and agents used them to conduct that investigation); *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313, 1319-20 (D. Utah 2003) (finding that it is the context in which agency has currently compiled a document, rather than the purpose for which the document was originally created, that determines whether it is “compiled for law enforcement purposes”); *Kansi v. Dep’t of Justice*, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (explaining that once documents become assembled for law enforcement purposes, “all [such] documents qualify for protection under Exemption 7 regardless of their original source”); *Hayes v. Dep’t of Labor*, No. 96-1149, 1998 U.S. Dist. LEXIS 14120, at *12 (S.D. Ala. June 10, 1998) (“Records that are incorporated into investigatory files also qualify . . . even though those records may not have been created originally for law enforcement purposes.”), adopted, (S.D. Ala. Aug. 10, 1998).

⁸ See <https://www.sec.gov/enforce/33-10601-s>.

have also confirmed with Enforcement staff that the public release of the requested records from Item Nos. 1 and 2, above, could reasonably be expected to cause harm to the ongoing investigation.⁹

I have also considered whether partial disclosure of the withheld information is possible, but have determined that it is not because such a disclosure would not be consistent with the purposes of Exemption 7(A).¹⁰

Please be aware that my decision to affirm the FOIA Officer's assertion of Exemption 7(A) should not be construed as an indication by the Commission or its staff that any violations of law have occurred with respect to any person, entity, or security. Should you have a continuing interest in the subject information, you may contact the FOIA Office within six months of the date of this letter to determine if the status of the on-going law enforcement proceeding has changed. As Exemption 7(A) precludes the release of the information at this time, no determination has been made concerning the applicability of any other FOIA exemptions. The Commission reserves the right to review the information to assert any other exemption when Exemption 7(A) is no longer applicable.¹¹

You have the right to seek judicial review of my determination by filing a complaint in the United States District Court for the District of Columbia or in the district where you reside or have your principal place of business.¹² Voluntary mediation services as a non-exclusive alternative to litigation are also available through the National Archives and Records Administration's Office of Government Information Services (OGIS). For more information, please visit www.archives.gov/ogis or contact OGIS at ogis@nara.gov or 1-877-684-6448. If you have any questions concerning my determination, please contact Mark Tallarico, Senior Counsel, at 202-551-5132.

For the Commission
by delegated authority,



Richard M. Humes
Associate General Counsel

⁹ See *Marzen v. HHS*, 632 F. Supp. 785, 805 (N.D. Ill. 1985) (concluding that Exemption 7(A) prohibits disclosure of law enforcement records when their release "would interfere with enforcement proceedings, pending, contemplated, or in the future"), *aff'd*, 825 F.2d 1148 (7th Cir. 1987).

¹⁰ I further find that it is reasonably foreseeable that disclosure of the withheld records would harm interests protected by Exemption 7(A) because such a disclosure could compromise ongoing enforcement proceedings.

¹¹ See *LeForce & McCombs, P.C. v. Dep't of Health and Human Services*, Case No. Civ-04-176-SH (E.D. Okla. Feb. 3, 2005) (an agency does not waive the right to invoke exemptions by not invoking such exemption during the administrative processing of a FOIA request).

¹² See 5 U.S.C. § 552(a)(4)(B).